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tions, may be returned by a minority of the people. They should, therefore, be faithfully maintained. They are the main safe-guards to the persons and property of the State.

It is easy to see that when the people are smarting under losses from depreciated bank paper, a feeling might be aroused that would under our plurality system, return a majority to the legislature, which would declare all banks a nuisance, confiscate their paper and the buildings from which it issues.

So with railroads, when repeated wholesale murders are perpetrated by some of them. And, in Great Britain and France, we have examples of the confiscation of the property of the churches even ; which, here, the same constitution that protects the dealer in beer, would render safe from invasion by the legislative power.

In our opinion for the reasons given above, the liquor act of 1855 is void. Let the prisoner be discharged.

Supreme Court of Louisiana, 1855.

GAINES' APPEAL, *in re SUCCESSION OF DANIEL CLARK.*¹

1. The provision of the Code of Louisiana, which requires for the proof of an olographic will, the "testimony of two credible witnesses, who declare that they recognize the testament as entirely written, dated and signed, in the testator's handwriting, as having often seen him write and sign during his lifetime," (Art. 1648,) is directory merely, and does not, where such proof is wanting by reason of accident, as in the case of a lost or destroyed will, exclude secondary evidence of the will. LEA, J., dissenting.
2. Contents of an alleged lost or destroyed olographic will, admitted to probate after the expiration of forty years, the delay being explained, upon evidence establishing the former existence and principal contents of such a will, and the probability of its due execution in accordance with the Code; though it did not affirmatively appear that the witnesses had ever seen the testator write or sign his name, in his lifetime. LEA, J., dissenting.

¹ Buchanan, J. took no part in the decision of this case.

Other branches of this same controversy, have been at different times before the Supreme Court of the United States. See, 13 Peters' Reports, 404; 15 Idem. 9; 2 Howard's Reports, 619; 6 Idem, 550; 12 Idem, 472; in which last decision the illegitimacy of the present appellant was held to be established.

This was an appeal from the decision of the Second District Court of New Orleans, refusing probate of the contents of an alleged olographic will of the late Daniel Clark.

The petition of the proponent, filed January 18th, 1855, was in the following words :

To the Hon. the Second District Court of New Orleans:

The petition of Myra Clark Gaines, who resides in the City and State of New York, respectfully represents that, on the sixteenth day of August, A. D. 1813, Daniel Clark, then residing in New Orleans, departed this life, leaving no descendants except your petitioner, who is the daughter of the said deceased; that on the thirteenth day of July, 1813, the said Daniel Clark made his last will, which was in substance and to the effect following:

"New Orleans, July 13th, 1813. In the name of God—Amen. I, Daniel Clark, of New Orleans, do make this my last will and testament. Imprimis: I order that all my just debts be paid.

Second. I do hereby acknowledge that my beloved Myra, who is now living in the family of Samuel B. Davis, is my legitimate and only daughter; and that I leave and bequeath unto her, the said Myra, all the estate, whether real or personal, of which I may die possessed, subject only to the payment of certain legacies hereinafter named.

Third. It is my desire that my friend, Chevalier Francois Dusuan Delacroix, shall have the charge of my said daughter Myra, and I do appoint and constitute him tutor to her.

Fourth. I give and bequeath to my mother, Mary Clark, now or recently of Germantown, in the State of Pennsylvania, an annuity of two thousand dollars, which is to be paid out of my estate, during her life. I further give and bequeath an annuity of five hundred dollars to Caroline Degrange, until she arrives at the age of majority, after which I give and bequeath her a legacy of five thousand dollars.

Fifth. I hereby nominate and appoint my friends, François Dusuan Delacroix, James Pitot, and Joseph D. D. Bellechasse, my

executors, with full power to execute this my last will, and to settle everything relating to my estate."

Petitioner further avers, that the said will contained other legacies and dispositions—that said testator gave a legacy of \$5,000 to a son of the said Pitot, and another of \$5,000 to a son of Mr. DeBuys, both of New Orleans; he also provided for the freedom and maintenance of his slave Lubin. In his said will, the said Clark made an inventory of his estate, with explanations of his business relations, and gave instructions to the said tutor Delacroix, in regard to the education of your petitioner. She further represents that the said will was an olographic one, wholly written, dated and signed by the testator in his proper handwriting, and at the death of the said Clark, was left among his papers at his residence. That after his decease, diligent search was made for the said will, but the same could not be found, nor has it been since, and it was either mislaid, lost, or destroyed. That the destruction of the said will has prevented her from giving the contents thereof, with any greater certainty than as set forth herein above. Petitioner further shows, that Messrs. Bellechasse and Pitot, two of the above named executors, are dead; that the said Delacroix—the other, is indisposed to accept the executorship of the said will—and that no presumptive heirs of the said Clark reside in this State. She further shows, that at the decease of the said Clark, and for many years after, she was a minor, wholly ignorant of her rights under the said will, and that after she arrived at the age of majority, and was made acquainted with the matters aforesaid, she instituted suit the 18th of June, 1834, in the Probate Court of New Orleans, for the purpose of proving the said will; but that said suit was dismissed, as in case of nonsuit, on the 8th day of June, 1836, without any fault of your petitioner. That in the year 1836, she instituted suit by Bill in Chancery, in the Circuit Court of the United States for the Eastern District of Louisiana, to set up the said will, and enforce her rights as universal legatee under the same, but that the Supreme Court of the United States dismissed her claim under the said will, as in case of nonsuit, without deciding on the merits of the cause, and without the fault of your petitioner.

Wherefore, she prays that this honorable court would fix a day, place and hour, for the proof of the said will; and after all due proceedings, such as the law requires, that the same may be recorded and its execution ordered, and for general relief; and she will ever pray, &c.

(Signed,) _____

SMILEY & PERIN,

P. E. BONFORD,

MOISE & WM. RANDOLPH,

Attorneys for Petitioner.

Upon this petition an order was made allowing proof of the will referred to, to be made at a day fixed. On the evidence then adduced, however, the court below was of opinion that the will had not been duly established according to the requirements of the Code; whereupon this appeal was taken.

The facts sufficiently appear in the opinion of the majority of the Supreme Court, which was delivered by

MERRICK, Ch. J.—In this case we adopt the carefully prepared statement of facts of the judge of the lower court; it is in these words, viz :

“The petitioner alleges that on the 16th day of August, 1813, the late Daniel Clark, her father, departed this life, having previously, viz: on the 13th day of July, 1813, executed an olographic last will and testament, by which he recognized her as his legitimate and only daughter, and constituted her his universal legatee, said bequest being subject, however, to the payment of certain specific legacies; that he appointed François Dusuan Delacroix, James Pitot, and Jos. Bellechasse, the executors of said will; that said will was wholly written, dated, and signed in the handwriting of the testator, and at his death left among his papers at his residence; that after his death, diligent search was made for the said will, but that the same could not be found, nor has it been since, and that it was either mislaid, lost or destroyed. It is unnecessary to recapitulate more in detail the alleged contents of the will, or to advert to the history of events as set forth in the petition, under which, the

court is called upon to recognize this lost document as a valid testament, after an interval of more than forty years, since the death of the alleged testator. The litigation, of which the present proceedings appears to be an upspringing shoot, is incorporated in the jurisprudence of the country, and a reference to it will not materially assist in the solution of the question submitted for adjudication. The petitioner asks that the will, such as she describes it, be admitted to probate, registered and ordered to be executed.

"To entitle the petitioner to a judgment, recognizing the existence and validity of the will, it is necessary that she should establish affirmatively, and by such testimony as the law deems requisite :

"First, That Daniel Clark did execute a last will containing the testamentary dispositions set forth in her petition.

"Second, That Clark died without having destroyed or revoked it.

"In looking for the testimony which might solve the question, whether such a will had ever been executed or not, a reasonable inquirer would naturally turn for information to those who were most with the deceased in the latter part of his life, and especially (if they could be found) to those who were with him in the last moments of his existence, when the hand of death was on him. Such witnesses, if they had no interest in diverting his property into any particular channels, might be considered as the best and most reliable that could be produced, and it appears to be precisely testimony of this character that the petitioner presents in support of her application. It appears that Boisfontaine had business relations with the deceased which brought him into frequent intercourse with him, and that for the last two days of his life, and up to the moment of his death, he was with him ; that Delacroix and Bellechasse were intimate personal friends, and that they were with him shortly before his death.

"Now these witnesses all concur in stating that Clark said he had executed a will posterior to that of 1811. They also testify that within a few months prior to his death, he was making arrangements for the disposal of his property by a last will. He called on Delacroix to get his consent to act as executor, and also to act as tutor to his daughter Myra, expressing his intention of making

generous provision for her in his will. Delacroix further states that Clark afterwards presented to him in his (Clark's) 'cabinet' a sealed packet, which he declared to be his last will, informing him, at the same time, that in case of his death, it would be found in a small black trunk which he had there. Boisfontaine, who was with Clark when he died, says that Clark, in his last illness, spoke of executing his last will; said it was to be found in a small black trunk in a room below stairs; that he had left the greater portion of his property to his child Myra; that Bellechasse, Delacroix and Pitot were to be his executors, and that about two hours before he died, he instructed his confidential servant, Lubin, that in case of his death, the small black trunk above referred to was to be delivered to Delacroix, and enjoined upon him as soon as he (Clark) was dead, to be sure to take it to him. He says that Clark expressed his satisfaction that he had provided for his daughter Myra, leaving her all his estate, and that Delacroix had consented to act as her tutor. He also states that he was present about fifteen days before Clark's death, when Clark took from the small black case a sealed package and presented it to Delacroix, stating that it was his last will, recapitulating some of its provisions, and reminding him of his promise to act as tutor to his daughter. He further states that several persons, shortly before Clark's death, had seen the will and corroborated Clark's statement as to its contents, and that Judge Pitot, Lynd the Notary, the wife of Wm. Harper, and Bellechasse, were among the persons referred to." Now the judge *a quo* proceeds: "I think there can be no doubt, setting aside the testimony of Bellechasse and Mrs. Wm. Harper, that Clark did execute a will shortly before his death; that the principal object of making this will was to recognize as his daughter the present applicant, and to make suitable provision for her; that the executors of his will were Pitot, Bellechasse and Delacroix, and that Delacroix was appointed tutor to his daughter Myra; that this will must have been in existence until within a very short time previous to Clark's death, if not after that event, and that Clark himself died believing it was in existence.

"That such was the opinion of Delacroix himself at the time is

evident from the fact that twenty-four hours had scarcely elapsed after the probate of the will of 1811, before he made oath, that he verily believed, that Daniel Clark had made a '*testament posterior to that of 1811*,' '*that its existence was known to several persons*,' and he accordingly applied for and obtained an order of the court, commanding every notary in the city to declare whether such document had been deposited with him.

" If the foregoing facts may be considered as proved, independent of the testimony of Bellechasse and Mrs. Wm. Harper, the additional testimony of these last named witnesses with reference to the form of the execution of the will and its contents, will rest upon a basis of probability which must strengthen, if it does not anticipate the conviction of its truth; for it is to be remembered that Clark knew how to draw an olographic will in due form, having already done so in the execution of the previous will, and knowing what was necessary to its validity, it would be improbable in the extreme that he would omit any of the few necessary formalities.

" When Bellechasse and Mrs. Harper therefore testified directly to the execution of the will as having been written, dated, and signed in the proper handwriting of the testator, they testify to the existence of facts which are at least probable, and upon the assumption that the will was executed are matters approaching to certainty, independent of their testimony; so with regard to the appointment of executors, of the tutor and of the general dispositions of the will as described in the petition.

" They state Clark did what he told others he intended to do, and what, from the whole tenor of his conduct, it was very probable he would do.

" It does not appear, however, that all the contents of the will, as sworn to by Mrs. Wm. Harper, are also sworn to by Bellechasse, and though the testimony of the latter does not contradict that of the former, but affirms it, yet his testimony does not relate to any portions of the will except such as relate to its form, the institution of his daughter as universal legatee, and the appointment of Delacroix, Pitot and Bellechasse as executors; indeed, the examination of witnesses does not appear to have been conducted with any

reference to a detailed description of the will. They, however, both state distinctly that they read the will; that it was wholly written, dated and signed by Clark; that he thereby instituted Myra Clark, his daughter, universal legatee, and appointed Delacroix, Pitot and Bellechasse his executors." From an examination of the whole testimony, and considering the conduct of the deceased, his repeated declarations up to the very day of his death, together with his anxiety to make ample provision for his daughter, the judge of the lower court added, "I feel satisfied that the legal presumption (which, in the case of a lost will, would necessarily exist,) that it was destroyed or revoked by the testator, must be considered as satisfactorily rebutted."

In addition to the statement of facts and conclusions in regard to them by the judge of the lower court, it may be remarked that Delacroix states that the endorsement upon the will which he saw sealed up was in these words: "Pour être ouvert en cas de mort." This endorsement does not appear upon the will of 1811, and the will which he saw was doubtless the will of 1813. In regard to the testimony of Colonel Bellechasse and Mrs. William Harper, there is nothing on this record which impeaches their credibility.

If it be objected that the amount of property left by Clark may have induced them to swerve from the truth, the reply has equal force, that there would be just as strong a reason for any other party in interest to have prevented the execution of the will, by its destruction. It may be remarked further, that the universal legacy being established beyond question, the particular legacies which tend to diminish the estate which will come into the hands of the universal legatee, are sufficiently proved, on general principles, against such legatee, by the testimony of a single witness, because these legacies are alleged and set up in the petition of the party who is to be charged with them, and she cannot be permitted afterwards to deny what she has alleged in her pleadings.

Agreeing fully as we do with the conclusions arrived at by the district judge, as to what has been proven, the only remaining question for us to solve is one of law, and it is, has this will been proven in conformity to Article No. 159, page 244 of the Old Code,

or Article 1648 of the New Code, which requires for the proof of the olographic will, the testimony of two credible witnesses, who declare that they recognize the testament as being entirely written, dated and signed in the testator's handwriting, as having often seen him write and sign during his lifetime?

The witnesses have sworn that the will was entirely dated and signed by Daniel Clark, but they nowhere say that they have often seen him write. They show an intimacy and relationship which leave little room to doubt that they really were well acquainted with his handwriting, and had probably seen him write often, as required by the Code, but they have not expressly said so.

The question can, therefore, be answered only by determining whether the provisions of law contained in this article of the Code are sacramental, and must be pursued in all cases, or whether they are merely directory, and the courts have power, in certain cases where this proof is wanting, by reason of accident, to avail themselves of the secondary proof—the next best of which the nature of the case will admit.

It would seem that there is a distinction between rules of law which prescribe the form in which wills and testaments are to be made, and those which direct the courts in what manner they shall be admitted to probate, and ordered to be executed. The first commencing at Article 1567 of the Civil Code are positive enactments, which are essential to the validity of the will. Their non-observance renders the supposed will null and void, by express provision of law. C. C., 1588. The rules, on the other hand, which are prescribed by the legislature for the opening and proof of testaments, commencing at article No. 1639, do not pronounce the penalty of nullity for their non-observance, and they nowhere say that other cases may not arise in which the strict letter of these rules may be inapplicable, and that the judge may not, in extraordinary cases, receive other equally satisfactory proof that the requirements of the law have been fulfilled.

In a nuncupative will by public act, it is required that certain formalities should be observed, before a notary public and three

witnesses. Without these observances the will would not exist as such.

The olographic will must be entirely written, dated and signed by the testator. Without the observance of these requisites, there is no legal will; and so of the other forms. But whenever these forms have been observed, there is then a valid will entirely independent of its probate, or any subsequent proceeding which may be commenced upon the same. But the law says that this valid will shall remain inoperative until it receive the order for its execution by the judge of the probate court. But it has never been pretended that the validity of this will is, in any manner, affected by the character of the proof, which the judge of the lower court may deem sufficient, on which to base his order. If the will is really valid, the irregular proof on which he may base his decree, cannot render it invalid. The will subsists, and therefore the judgment might be corrected on appeal; yet, if it were suffered to remain, the courts would never permit a party to lose his right by a mere irregularity in the proof upon which the decree was founded. *Faulkner vs. Field*, 1 Rob. La. 48. So in the case before us; the will of 1811 was admitted to probate by Judge Pitot, upon the single declaration of the witnesses, "that the same was in the proper handwriting of him, the said Daniel Clark." No one will pretend that this will was rendered invalid, because those witnesses did not swear that they had often seen Daniel Clark write. Had the will afterwards been attacked, on the ground that the will was not in the handwriting of Daniel Clark, it would doubtless have been sustained, on satisfactory proof, that it was entirely written, dated and signed in the handwriting of the testator.

The distinction which we here draw between the positive enactments of law, in regard to the form for the execution of wills, and the directory provisions in regard to the proof of the same, seems to have been fully recognized by our predecessors. In the case of *Bouthemy vs. Dreux et als.*, 12 Mart. R., page 639, the court maintained a nuncupative will by private act, which had been admitted to probate on the testimony of a single witness, notwithstanding Article No. 159, page 244 of the Old Code. The distinction was also

taken in the case of *The succession of Robert, Pelié executor*, 2 Rob. La. 433; also, in effect, in the case of *The succession of Eubanks*, 9 Ann. R. 147, where a witness was admitted to testify who did not possess the qualifications required by Article 1584, C. C. This distinction also pervades the jurisprudence of France on this subject. By Article No. 1007 of the Code Napoleon, it is made the duty of the judge to make a procès verbal of the presentation of the olographic will, the opening of it, the order in which he found it, and the order of deposit with the notary. These provisions appear to be considered directory only. *Paillet*, note 2 to Article 1007, Code Napoleon, says:

“La présentation du testament au président du tribunal, l'ouverture des testaments par magistrat, et le procès verbal qu'il doit dresser ainsi que de l'état du testament, sont sans contredit des précautions que la loi a cru nécessaires, pour qu'on peût être assuré de plus en plus de la volonté des testateurs ; mais la loi n'a point attaché à l'inobservation de ces formalités de la peine de nullité, et on ne saurait la prononcer, surtout lorsque rien n'indique de fraude de la part de l'héritier institué ou du légataire.” See note and authorities there cited.

Taking it, therefore, as granted that the distinction which we have indicated exists, the next question which presents itself is, do the circumstances of this case take it out of the rule prescribed by Article No. 1648 of the Civil Code? We think the loss or destruction of the will after the death of Clark, and the long period of time which has elapsed since his death, justify a resort to secondary evidence, which would not have been necessary, if the will had not been lost or destroyed, and if so long a period had not elapsed before an attempt had been made to admit it to probate. We think this view of the law is fully sustained, both by reason and authority.

Article 1648 contemplates that the olographic will shall be presented before the judge before whom it is to be proven. Yet none would seriously contend that the calamity which deprived the legatee of the will, would prevent him from establishing its contents by secondary evidence. Were this the law, a reward would be offered to villany, and it would always be in the power of the unscrupulous heir to prevent the execution of the will. The case of *Thomas et*

al. vs. Thomas, 2 L. R. 166, was a controversy in regard to a lost will, which it had been alleged had already been admitted to probate. The objection to the proof was: "That parol proof of the execution of the will could not be given in that court; that a will, being an instrument clothed with certain formalities prescribed by law in order to give it effect, no evidence of its loss or its contents could be offered until its existence, with the requisite formalities, had been proved."

Judge Porter, as the organ of the court on this point, remarks with his usual felicity: "The first objection is entitled to more consideration, but we still believe it unsound. The law of evidence would have a poor claim to the praise justly bestowed on it, if it did not foresee and provide for such a case as this. That rule which is the most universal, namely, that the best evidence the nature of the case will admit, shall be produced, decides the objection; for it is only another form of expression for the idea, that when you lose the higher proof you may offer the next best in your power. *The case admits of no better evidence than that which you possess, if the superior proof has been lost without your fault.*"

"The rule does not mean that men's rights are to be sacrificed and their property lost, because they cannot guard against events beyond their control. It only means, that so long as the higher or superior evidence is within your possession, or may be reached by you, you shall give no inferior proof in relation to it. Particular rules which require written proof always relax themselves to meet absolute necessity, or that necessity which is occasioned by occurrences common among men.

"There is nothing in a will being required to be made in a particular form, which makes it an exception to this great law of necessity. It may increase the difficulty of proof, but furnishes no reason to refuse hearing it. The court, in this case, had proof before them which much diminished the danger of parol evidence.

"In the case of *The succession of Maria J. Robert, Pelié executor*, 2 Rob. Rep. 484, which was a contest growing out of an olographic will executed in France, and there deposited, the proof was by witnesses who were acquainted with the handwriting of the tes-

tatrix. It does not appear that they had often seen her write. The court, after holding this sufficient, as being all which was required by the law of France, says: "It has been insisted, however, that Articles 1648 and 1649 of our Code show that the original will ought to be produced, in order to be identified with the testimony of the witnesses who have recognized it; and that, in its absence, the evidence would be incomplete. This position would perhaps be correct, if the witnesses were in personal attendance before the court of probate; but these articles are not negative laws; they do not say that no other kind of proof shall be admitted, and we doubt very much whether, under their application, if an olographic testament executed here, had by some accident been destroyed before being legally proved, a true copy of it, identified with the original, by the testimony of two credible witnesses who had seen both, and who would be able to swear to the genuineness of the original, in the manner pointed out by law, should not be considered as sufficient compliance with the provisions of our code.

"Surely we are not prepared to say that, in such a case, the legal rights acquired under the will would also be defeated, and that the party would be left without a remedy. This is, indeed, an analogous and even stronger case, and as, in our opinion, the law-makers cannot have intended to require an impossibility, we must conclude that, under such circumstances, the proof furnished by the appellants is a sufficient compliance with the requisites of the codes, and that the inferior judge did not err in ordering the execution of the will under consideration."

In view of these decisions of our own courts, in regard to the construction of Article No. 1648, it is not necessary to examine the decisions of the court, on analogous articles of the Civil Code, and the Code of Practice, in order to arrive at a conclusion on this. The doctrine of the common law is in consonance with the view taken by our own courts. The books are filled with adjudged cases, in regard both to lost deeds and wills. We will content ourselves by citing one—the case of *Dan vs. Brown*, 4 Cowen, 483. The suit was brought upon a *lost will* devising real estate. By the

statute laws of New York, a will devising real estate was required to be proved by three credible witnesses. The Supreme Court of New York say, in regard to this lost will : "The will of Benajah Brown was proved by one of the subscribing witnesses. He stated it was executed in the presence of himself, James Mallory, and another person, whose name he did not recollect, but which he had no doubt of his being a credible witness. This," the court adds, "was all the evidence which could be expected under the circumstances of the case."

Considering that the administration of justice requires something more than the application of the letter of the law designed for one class of cases of ordinary occurrence, to all others, however they may have been modified by accident, and believing that the spirit of our laws provides for the case which the applicant has presented to us, we conclude that the will of 1813, such as she has set forth in her petition, should be admitted to probate.

It has been objected, as we understand the argument, that this court has no jurisdiction of this case on appeal, under the Constitution, because there is no *contestatio litis* formed, and because there are no proper parties to the appeal. We dismiss this objection with the single observation, that it is not necessary under the Constitution, that there should be a technical *contestatio litis*, in order to give this court jurisdiction ; and if the attorney of absent heirs were even necessary as a party, his presence here is sufficient to sustain this appeal.

We are not insensible to the argument that this claim has remained for forty years without being set up in a court of justice, in a form to be prosecuted to effect, and that rights have been recognized under the sales made under the will of 1811. The staleness of petitioner's suit is best answered by reference to the litigation in which the petitioner's alleged rights have been prosecuted in other forms ; and we may suppose it did not become necessary to resort to the unusual proceeding of applying for the probate of a lost will, until after those cases were decided. The plaintiff presents to us a *prima facie* case, which entitles her to relief.

The decision which we make does not exclude any one who may

desire to contest the will with her in a direct action, and to show that no such will was executed. On the other hand, a refusal to probate the will places it beyond the power of the applicant to set up her rights under the will, against any other person.

It is therefore ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed; and, proceeding to render such judgment as should have been rendered in the lower court: It is ordered, adjudged and decreed, that the will of Daniel Clark, dated New Orleans, July 13, 1813, as set forth in plaintiff's petition, be recognized as his last will and testament, and the same is ordered to be received, recorded and executed as such; and it is further ordered that Francois Dusuan De la Croix be confirmed as testamentary executor of said last will and testament, and that letters testamentary issue to the said De la Croix, and that the costs of this proceeding be borne by the succession.

LEA, J., who had been also judge of the court below, at the time of the offer of the will in question for probate, dissented.

*In the Court of Errors and Appeals of the State of Delaware,
October, 1855.*

UNION CHURCH OF AFRICANS vs. ELLIS SAUNDERS.

Under the voluntary system of church government, in this country (except, it would seem, in cases of actual endowment), a mandamus cannot issue to compel the trustees or members of a particular church to admit a minister to the exercise of his spiritual functions, and this, though he may have been duly appointed thereto by the superior ecclesiastical authority,—e. g. by a Methodist yearly Conference,—especially if the right of consent is reserved by charter or agreement to such trustees or members.

The opinion of the court was delivered by

JOHNS, Ch.—The Superior Court, on the petition of Ellis Saunders, having awarded the writ of mandamus, commanding the Union Church to admit him to the exercise of the functions of his office, the case has been brought before this court by writ of error.